No. 10584

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL FIRE ASSOCIATION, a corporation, *Appellant*,

vs.

UNION MUTUAL FIRE INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, a corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

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(b) JURISDICTION OF THE DISTRICT COURT AND THIS COURT

This action was begun by the filing of a complaint in the Superior Court of King County, Washington (Tr. 2), wherein the appellant Northwestern Mutual Fire Association, a corporation under the laws of the State of Washington, was plaintiff, and the appellee Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation of the State of Rhode Island, was defendant, to recover the sum of $40,148.72, besides interest and costs. The appellee duly filed a petition for removal to the District Court

of the United States for the Western District of Washington, Northern Division (Tr. 15), and a bond for such removal (Tr. 19), and after due proceedings were had, the said Superior Court duly entered its order on removal (Tr. 23).

On June 22, 1943, the said United States District Court entered judgment and decree in favor of the appellee (Tr. 80) and appeal was taken therefrom by the appellant by notice of appeal and cost bond on appeal duly filed on September 9, 1943 (Tr. 82).

The statutory provisions believed to sustain the jurisdiction of the District Court are Judicial Code §24(1) and §28, U.S.C. Title 28, §41(1) and §71. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code §128, 28 U.S.C. §225, and C. 14, §1 of Act of Jan. 31, 1928, 45 Stat. 54, U.S.C.A., §861(a).

(c) STATEMENT OF THE CASE

The amended complaint (Tr. 27) states that on January 1, 1940, the appellant and appellee entered into a certain reinsurance agreement which is set out in full beginning at Tr. 28. Under Article I of this contract, the appellant (called the reinsured company) agreed to cede reinsurance to the appellee (called the reinsuring company) and the appellee agreed to accept such reinsurance (Tr. 28). This contract does not explain clearly the method of this ceding, but it appears in the evidence that this ceding was done by the sending by the appellant to the appellee of "certificates of reinsurance" upon forms such as are set out in defendant's Exhibit "A-5" (Tr.

94) and plaintiff's Exhibit "3" (Tr. 217). The amended complaint further states (Tr. 40) that during the year 1940 the Washington Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma Narrows Bridge, and the appellant, in the early part of June, 1940, had notified the appellee thereof and requested that the appellee would inform the appellant how much reinsurance it was prepared to accept from the appellant. The amended complaint further states that on June 10, 1940, the appellant sent to the appellee a telegram (Tr. 40) regarding this matter, which contained the statement: "Further information just received indicated PML about 50%. We will retain $50,000."

The amended complaint further states that the appellee in reply notified the appellant that it would accept $50,000 of reinsurance (Tr. 41), that the appellant also received similar acceptances from other insurance companies in the aggregate sum of $250,000 (Tr. 41) and that, relying upon such acceptances the appellant issued to the Washington Toll Bridge Authority its policy of insurance in the sum of $350,000 and thereafter sent to the appellee its notification that it had ceded to the appellee $50,000 of reinsurance upon its said $350,000 of insurance. The meaning of this "cession of reinsurance" is that if the "reinsured" (the appellant) should suffer a loss on its $350,000 policy of "primary insurance" then the "reinsurer" (the appellee) would reimburse the appellant to the extent of 50,000/350,000 (or one-seventh) of the appellant's loss and adjustment expenses. Such a

"cession of reinsurance" was referred to on the trial of this case by the witnesses variously as "pro rata," "contributing" or "specific" reinsurance.

The amended complaint further states (Tr. 42) that a loss was sustained upon the appellee's policy of insurance in the sum of $269,230.78, that the appellant paid an adjustment expense of $11,810.20, and that the proper share of such loss which the appellee should pay to the appellant was the sum of $38,461.54, together with $1,687.18, the appellee's share of the adjustment expenses.

The amended answer of the appellee to the amended complaint (Tr. 58) admitted generally all of the allegations of fact contained in the amended complaint, which we have recited, excepting the conclusion of the proper amount of the appellee's indebtedness to the appellant and set up a second affirmative defense, which was as follows (Tr. 61):

The appellee first referred to Article VIII of the reinsurance agreement set out in the amended complaint, the parts of which material to this controversy are as follows:

> "Cessions hereunder shall in no case and at no time on one risk exceed $25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; *provided,* (1) *the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company.*" (Tr. 32). (Italics ours).

After referring to Article VIII of the reinsurance agreement the appellee alleged

> "That the plaintiff in making said cession represented to the defendant that it was retaining $50,000.00 net of said insurance, as provided in said Article. That, relying upon the terms of said Reinsurance Agreement and believing and relying upon said representation of the plaintiff, the defendant approved said cession of $50,000. That at the time said cession was made the plaintiff, contrary to its said representation and in violation of said Article VIII and without notifying the defendant thereof, reinsured all but $32,000.00 of the total insurance of $350,000.00 covered by plaintiff's said policy No. 614-3652, mentioned in paragraph V of the amended complaint herein; and the amount of said insurance then, and at all times thereafter, retained net by the plaintiff, without reinsurance, at its own risk and liability under Article VIII of said Reinsurance Agreement was only $32,000.00; whereas under the terms of said Article VIII the plaintiff, in ceding said $50,000.00 of reinsurance to the defendant, was required to retain net at all times, without reinsurance, at its own risk and liability, an amount not less than $50,000.00 of said insurance. That the defendant had no notice or knowledge of the plaintiff's said violation of Article VIII of said Reinsurance Agreement, or of the plaintiff's failure to comply with its said representation, until a date subsequent to the loss of the Tacoma Narrows Bridge, to-wit, on or about October 1, 1941." (Tr. 62, 63).

On account of the facts above alleged, the appellee

invoked the provisions of Article XIV of the reinsurance agreement, which reads as follows (Tr. 63):

> "If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with."

On this account, the appellee claimed that it owed to the appellant the sum of $26,897.55, which it tendered. Finding 15, made by the court (Tr. 77) states that this tender was paid by the appellee to the appellant and accepted by the appellant under stipulation that such payment was made and accepted without prejudice to or waiver of the claim of either party as to the balance of appellant's claim.

Upon the trial of this case, the appellee sought to prove its allegation in its amended answer which we have above quoted by introducing in evidence plaintiff's Exhibit "1" (Tr. 197). This exhibit is what was referred to throughout the trial as a "catastrophe excess reinsurance" issued by agents for Lloyds, wherein certain underwriting members of Lloyds reinsured the appellant applying "blanket to all hazards written by the Reinsured company (liability assumed under excess reinsurance contracts excluded) on property wherever located in the United States of America and/or Dominion of Canada" (Tr. 204).

Paragraph 4 of this policy provided as follows (Tr. 204):

> "4. The reinsurers are not liable for any loss or damage unless the Reinsured Company has paid or has become liable for a nett amount in excess of Thirty Thousand Dollars in any one loss, and then only for 90% of the amount of such loss or damage in excess of Thirty Thousand Dollars but in no event to exceed Two Hundred Thousand Dollars."

Paragraph 6 of this policy provided as follows (Tr. 205):

> "The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate nett loss of the Reinsured Company on its nett retained lines only."

In plain language, this policy means that if the appellant should suffer a loss from one cause, and the aggregate of all its losses on its net retentions should exceed $30,000, the reinsurers would reimburse the appellant to the extent of 90% of the excess of such loss over $30,000 up to a maximum loss of $200,000. *This loss was not limited to one property or one policy of insurance but extended "blanket" over the entire business of the appellant.*

During the progress of the trial, counsel for the appellant asked its first witness:

> "What, in insurance language, is meant by the term 'net retention' or, as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property?" (Tr. 164).

Upon objections being made to this question by coun-

sel for appellee, by permission of the court, counsel for appellant amended its amended complaint by additionally alleging as Paragraph X thereof the following:

> *"That under the usages and customs of the insurance business and in the insurance world the term 'net retention' or the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention."* (Tr. 165)

Thereupon, the court permitted the appellant to submit evidence proving such a usage (Tr. 168) and the trial was continued from December 30, 1942, to April 20, 1943 (Tr. 240), for the purpose of giving the appellee opportunity to meet the appellant's evidence.

At the close of the case, the trial court announced its decision in favor of the appellee and thereafter entered findings of fact and conclusions of law (Tr. 66). Findings of fact I to VII and IX to XI are merely a recital either of facts which were alleged and admitted in the pleadings, or of evidence about which there is no question. The findings of fact, which the appellant claims are erroneous and which, under the testimony in this case, are really conclusions of law, are as follows (Tr. 74-79):

VIII.

"That the plaintiff's statement in its said wire of June 10, 1940, that it would retain $50,000,

and the plaintiff's statement in said daily report No. 10852 that it was retaining 'identical $50,000,' constituted warranties to the defendant that the plaintiff was retaining under Article VIII of said treaty, $50,000 net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the said reinsuring company. That the defendant, believing and relying upon the plaintiff's said warranties as it was justified in doing, authorized and approved said cession of $50,000. That said cession by the plaintiff to the defendant was a cession of $50,000 of reinsurance upon the Tacoma Narrows Bridge and approaches as one unit and risk, the single-risk maximum of $25,000, designated by Article VIII of said treaty, being increased to $50,000 by the above mentioned specific authorization and approval of the defendant, pursuant to and in accordance with the provision of Article VIII of said treaty permitting this to be done in specific cases subject to the approval of the defendant. That the court finds that said reinsurance was not ceded to the defendant upon a two-risk or multiple-risk basis, but, on the contrary, was ceded on a one-risk basis.

* * * *

XII.

"That the purpose of the net retention provision in Article VIII of said reinsurance treaty of January 1, 1940, is to assure the reinsurer that the ceding company will at all times have as much at stake, dollar for dollar, in the particular insurance as the reinsurer, since the reinsurer must depend upon the knowledge, judgment, diligence and good faith of the ceding company in investigating and appraising the risk, placing the

original insurance and making investigations and adjustments in the event of loss.

XIII.

"That, by virtue of the existence of said excess of loss reinsurance contract between the plaintiff and Lloyd's (Plaintiff's Exhibit 1), the maximum liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was $32,000; and the actual amount retained net under Article VIII of said treaty by the plaintiff, without reinsurance at its own risk and liability on the same property so reinsured by the plaintiff with the defendant, was at all time $32,000; and these facts were readily determinable by, and known to, the plaintiff at the time it made said cession to the defendant.

"That the plaintiff, in making said cession of $50,000 of reinsurance to the defendant, owed to the defendant an obligation of the highest good faith to correctly compute and advise the defendant of the plaintiff's actual net retention under Article VIII of said reinsurance treaty and to further advise the defendant of all relevant facts bearing upon said net retention and the nature of the risk. That the plaintiff did not inform the defendant, as it should have done, that its actual net retention was $32,000, and not 'identical $50,000' as represented and warranted to the defendant. That the defendant has been prejudiced by reason of said failure on the plaintiff's part. That, in view of the plaintiff's actual net retention of $32,000, the plaintiff was without right or authority, under Article VIII of said treaty, to cede to the defendant more than $32,000 of reinsurance on said bridge.

XIV.

"That said reinsurance treaty of January 1, 1940, between the plaintiff and the defendant provides in Article XIV as follows: 'Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.' That the defendant was and is entitled to demand, as it did demand, that its liability with respect to such reinsurance be adjusted in accordance with the provisions of said Article XIV. That had the provision governing net retention in Article VIII of said treaty been complied with by the plaintiff, the defendant would have been ceded $32,000 of reinsurance and would have been liable for its pro rata share of the loss, computed on the basis of a $32,000 cession. That the court finds that the amount of defendant's liability to the plaintiff with respect to said reinsurance must be determined under the Article XIV on the basis of a $32,000 cession.

XV.

"That the amount of defendant's actual liability to the plaintiff, computed in accordance with Article XIV of said reinsurance treaty, was $25,624.31. That said amount, plus interest at 6% per annum to June 21, 1942, or a total amount of $26,897.55, was tendered and paid by

the defendant to the plaintiff on June 20, 1942, and was accepted by the plaintiff on that date. That it was stipulated and agreed, however, by the parties hereto that said payment was made and accepted without prejudice to, or waiver of, the plaintiff's claim for any amount in excess of the sum so paid, and without prejudice to, or waiver of, the defendant's objection and defenses to the plaintiff's claim for any amount in excess of the sum so paid. That the plaintiff has been fully paid by the defendant all the plaintiff is entitled to receive from the defendant.

XVI.

"* * * That the court finds that the terms of Article VIII of said treaty of January 1, 1940, are plain, clear and unambiguous and do not permit of modification, amendment or interpretation by extrinisic evidence. That the court further finds that in any event, under the customs and usages of the insurance business and in the insurance world, the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' as used in Article VIII of said treaty, does not include and does apply to excess loss of reinsurance such as Plaintiff's Exhibit 1, and means what it says, namely: the amount retained net by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company after deducting all reinsurance, including excess of loss reinsurance such as Plaintiff's Exhibit 1.

XVII.

"That the plaintiff introduced testimony to

support its contention that the term P.M.L. (probably maximum loss), as used in its wire of June 10, 1940, and its daily report No. 10852, indicated two risks; and the defendant introduced testimony in rebuttal thereto. The court finds from a preponderance of the evidence that the contention of the plaintiff in this regard is not sustained, and further finds that said term did not and does not indicate two risks or a multiplicity of risks as applied to the facts and circumstances in this case."

Thereupon the court made a conclusion of law that the plaintiff was entitled to no recovery from the defendant (Tr. 79), and entered judgment accordingly (Tr. 80), from which this appeal is taken.

(d) SPECIFICATION OF ERRORS

We respectfully submit that the trial court erred in the following particulars:

1. In making its Finding of Fact VIII for the reason that the court throughout in this finding ignored the clearly and positively proven usage not to consider catastrophe excess insurance in computing "net retention," and also ignored the provision in the pleaded insurance agreement that the judgment of the appellant as to what constituted "one risk" *was to be binding on the appellee* and also ignored the clearly proven fact that "one risk" involved in this transaction as adjudged by the appellant was not greater than 50%, as expressed in the P.M.L.

2. In making its Finding of Fact XII for the reason that it should have recited that the purpose of the net retention provision therein mentioned as being to

assure the reinsurer that the ceding company would have at all times as much at stake as the reinsurer, was subject to the well-known and usual practice of all insurance companies in general and the appellant in particular to maintain catastrophe excess insurance as it had done.

3. In making its Finding of Fact XIII, for the reason that there is nothing in the contract or the evidence that justified the court in interpolating the words "in the event of any one loss" in this transaction but, on the contrary, the contract was made to cover *all* losses which might occur during the existence of the insurance, and for the further reason that in calculating that the liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was $32,000 and that the actual amount retained net by the plaintiff was $32,000, the court must have necessarily interpreted the term "net retained lines only" as used in paragraph 6 of plaintiff's Exhibit 1 with reference to the retained line of the appellant upon this bridge was $50,000; and, also, for the reason that it was conclusively proven in the trial of this action that under the invariable usage of persons engaged in the reinsurance business, policies of catastrophe excess loss insurance, such as plaintiff's Exhibit 1, *are never used in computing net retention*, and that, therefore, the court should have found that the net retention of the appellant in this case was $50,000.

4. In making its Finding of Fact XIV for the same reason as hereinabove specified with regard to its making of Finding of Fact XIII.

5. In stating in Finding of Fact XV that the

amount of defendant's actual liability to the plaintiff was $26,897.55 together with interest, instead of $40,-148.72, with interest, as stated in the amended complaint, for the reason that the computation of the court is based upon the assumption that the net retention of the plaintiff was $32,000, while for the reasons stated in Specification of Error 3, it should have assumed that such net retention was $50,000.

6. In making its Finding of Fact XVI for the reasons as stated above in Specification of Error 3, and, also, because the said expressions (contained in Article VIII) are not plain, clear or unambiguous, but on the contrary appear upon their face to be clearly technical terms and are such terms as under the law applicable thereto require evidence as to the usages and customs of the insurance business to properly interpret them, and further for the reason that the evidence is conclusive in this case that even assuming that such expressions are plain, clear and unambiguous, they have a definite meaning when used in reinsurance contracts to the effect that policies of catastrophe excess loss insurance, such as Defendant's Exhibit 1, are never considered in computing such net retentions.

7. In making its Finding of Fact XVII for the reason that it was the contention of the appellant (in the language of the contract) that the term "PML" as used in its wire of June 10, 1940, and its Daily Report No. 10852, indicated that in the judgment of the appellant there was no risk involved greater than 50% of the amount of insurance placed; and for the further reason that the evidence is conclusive in this

case that according to the usages and customs of the insurance business the term "PML" indicates that it is the judgment of the person using such term that there is no risk involved greater than the said percentage, and that in this case it indicated that in the judgment of the appellant "one risk," as used in Article VIII of the Reinsurance Agreement and as applied by the appellant in this transaction and as commonly understood among insurance men, did not exceed $25,000.

8. In concluding that the appellant was entitled to no recovery instead of concluding that the appellant was entitled to recovery as prayed in the amended complaint, less the amount tendered and paid by the appellee as stated in Finding of Fact XV.

9. In entering judgment in accordance with its conclusion of law instead of entering judgment in favor of the appellant for the amount as prayed in the amended complaint, less the amount tendered and paid by the appellee as stated in Finding of Fact XV.

(f) ARGUMENT

Inasmuch as all of the errors hereinabove specified are based upon the conclusion of the trial court as stated in Finding of Fact XVI "that the terms of Article VIII of said treaty are plain, clear and unambiguous" and, therefore, "do not permit of modification, amendment or interpretation by extrinsic evidence," we believe that it would be conducive to clearness and conciseness to argue all the specifications of error together pursuant to the following:

Summary

1. Oral testimony is admissible to define the meaning of words used in an agreement where it appears that under the circumstances the words were used in a sense different from their ordinary meaning.

2. The evidence in this case is undisputed and conclusive that, according to the usage of the insurance business, the existence of a catastrophe excess policy such as Defendant's Exhibit 1 herein is never taken into account in computing "net retention."

3. The reasons given by the appellee's witnesses for their never having seen an instance of excess insurance being taken into account in computing "net retention,"

First: Where the amount of the attachment point (here $30,000) exceeds the "net retention" on a "single risk."

Second: Where the existence of the excess reinsurance is known or made known to the pro rata contributing reinsurer.

4. The real reason for the usage.

1. ORAL TESTIMONY IS ADMISSIBLE TO DEFINE THE MEANING OF WORDS USED IN AN AGREEMENT WHERE IT APPEARS THAT UNDER THE CIRCUMSTANCES THE WORDS WERE USED IN A SENSE DIFFERENT FROM THEIR ORDINARY MEANING.

This entire controversy depends upon whether the expressions used in Defendant's Exhibit A-1 (Tr. 92), "We will retain $50,000," and in Defendant's Exhibit A-5, "Northwestern retains identical $50,000," were true as the word "retain" would be defined according to the usage common in the insurance business, or whether the appellant actually retained but $32,000.

As the law applicable to this controversy, we find the following:

> "§245. Usage is habitual or customary practice. Comment: a. Usage is not in itself a legal rule, but merely habit or practice in fact. * * * A usage may prevail * * * in only a special trade."
>
> "§246. Operative usages have the effect of (a) defining the meaning of the words of the agreement or the meaning of other manifestations of intention. * * *
>
> "Comment on Clause (a):
>
> "a. The rule stated in the clause is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear. What usages are operative is stated in §247."

"§247. A usage is operative upon parties to a transaction where and only where

"(a) they manifest to each other an assent that the usage shall be operative or

"(b) either party intends the effect of his words or other acts to be governed by the usage and the other party knows or has reason to know this intention, or

"(c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage."

"§248. * * * (2) Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention." (Restatement of the Law of Contracts, pp. 345-354)

"Another class of cases in which an apparent, or sometimes, perhaps, a real exception occurs, is that in which external evidence is admitted to explain the meaning in which particular terms in a contract were understood by the parties, having regard to the language current * * * among persons dealing in that kind of business. * * * The terms thus explained need not be ambiguous on their face. Parol evidence is equally admissible to explain words in themselves ambiguous or obscure and to show as in the case of 'a thousand of rabbits,' that common words were used in a special sense." (Pollock's Principles of Contracts, Tenth Edition, pp. 248, 249)

"§650. * * * But there are now numerous de-

cisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest. This is not only true of technical terms, but of language, which, at least on its fact, has no peculiar or technical significance; though even today it is still occasionally said by courts that usage cannot control words having 'a definite legal meaning;' or cannot be used to interpret a contract unless there is uncertainty on the face of the instrument. So it is often said also that usage is admissible to explain what is doubtful but never to contradict what is plain. If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded (and this is what the statement seems naturally to mean) it is inconsistent with many decisions and wrong in principle." (Williston on Contracts, Revised Edition (1936) pp. 1874-1876)

"The liberal rule, on the other hand, is today conceded, practically everywhere, to permit resort in any case to the *usage* of a *trade* or *locality*, no matter how plain the apparent sense of the word, to the ordinary reader; and some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words, and the injustice of attempting to enforce a supposed rigid standard." (Wigmore on Evidence, Third Edition, Vol. 9, §2463, p. 204)

"Evidence of usage may be admissible to construe particular words and terms which, in reference to the subject matter of the contract, have by usage acquired a meaning different from their popular one, even though the words are unambiguous in their ordinary sense." (25 C.J.S., p. 111, Customs and Usages §24)

"Notwithstanding the parol evidence rule, parol evidence is always receivable to define and explain the meaning of words in a contract which are technical, or which have two meanings—the one common and universal, and the other technical; permitting oral evidence in cases of this kind is not allowing it for the purpose of varying or altering the contract or putting a different sense or construction upon its language from that which it would ordinarily bear, but is allowing it for the purpose of showing what was the real intention in using such language. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. 10 R.C.L. 1072."

"Such a technical or trade meaning is usually proved by evidence of trade custom or usage. See 27 R.C.L. 170."

"As indicated in the above title, it is the purpose of the annotation to collect only those cases where the terms of the contract are unambiguous on their face." (89 A.L.R. 1229)

The annotation then proceeds from this statement on page 1229 to page 1253 with citations of cases upon this question, and it is manifestly not possible to cite so many cases in this brief, nor do we believe that any citation or analysis of these cases by us would be of any assistance to this court in view of the able and unprejudiced analysis given to them by the editors of this note. It is sufficient to say that after a careful analysis of all these cases one must necessarily arrive at the conclusion that the editors of this note were absolutely correct in their conclusion which we have above quoted.

2. THE EVIDENCE IN THIS CASE IS UNDISPUTED AND CONCLUSIVE THAT, ACCORDING TO THE USAGE OF THE INSURANCE BUSINESS, THE EXISTENCE OF A CATASTROPHE EXCESS POLICY SUCH AS DEFENDANT'S EXHIBIT 1 HEREIN IS NEVER TAKEN INTO ACCOUNT IN COMPUTING "NET RETENTION."

In the appellant's case, Karl P. Blaise who since 1932 had been Vice-President and Secretary of a reinsuring company which dealt in nothing but reinsurance, defined net retention as "that amount of liability on a given risk remaining to the account of the primary company after the deduction of all *specific* reinsurance from the gross line relating to that particular risk" (Tr. 170) (Italics ours). He then translated this technical language into the plain statement that inasmuch as the $350,000 which the appellant had placed on this bridge had been reduced by specific reinsurance to $50,000, the sum of $50,000 would be the net retention of the appellant under that policy (Tr. 170). This witness further testified that never in his experience had he ever seen on a report of cession of reinsurance any reference to the existence of catastrophe excess insurance "because it has nothing to do with the reduction of the liability on any given individual risk" (Tr. 178)

The witness John F. Sullivan, Associate Manager of a reinsurance brokerage firm, and who had been a deputy insurance commissioner in the State of Washington from April 1, 1933, to October 1, 1942 (Tr. 185) defined net retention as follows:

"Net retention as it is used in the trade means

> the amount which a company would retain of the risk for its own account of a policy of insurance which would have been issued for possibly a larger amount, and they may have ceded off or given off some of the risk to other companies through means of reinsurance" (Tr. 186)

Also,

> "A. If a company cedes off by means of specific reinsurance, it reduces the amount it has at risk. Q. Does catastrophe excess reinsurance affect in any way the net retention of an insuring company? A. No, it does not" (Tr. 187)

This witness further stated that examinations are periodically made of all insurance companies by the various insurance departments of the different states (Tr. 190) and that the reports of such examinations show both their gross and their net retention of risk which each company has on its books, and that the net retention, as shown in the report, does not "take into consideration the existence of catastrophe reinsurance" (Tr. 191)

John J. Beall, Executive Vice-President of the appellant and the officer of the appellant who had in 1928 negotiated the first reinsurance agreement with the appellee (Tr. 225), defined net retention as "net retention refers to the amount of the primary insurance for which the primary company is liable, less the amount of specific reinsurance ceded" (Tr. 213). He then, for the purpose of illustrating this language, took the case in point where the appellant had assumed liability upon its original insurance in the sum of $350,000, had placed specific reinsurance totalling $300,000, which left its retention in the sum of $50,-

000 (Tr. 213). This witness then immediately testified that the existence of catastrophe excess insurance, as evidenced by Defendant's Exhibit 1, had no effect on the amount of retention (Tr. 213).

The Appellee's Assistant-Secretary, J. M. Legris, testified that the appellee itself recognized this usage. When shown Plaintiff's Exhibit 2 (Tr. 125-128), he interpreted it (Tr. 117) as a cession of reinsurance from *appellee* to *appellant*, showing a retention of $71,000 on wind insurance, which was after having ceded to the appellant $141,199 of specific reinsurance, showing how the *appellee* treated a transaction similar to the present one. Upon being asked to suppose that a loss had been sufficiently large to take up $50,000 of the appellee's $71,000 retention, he stated that the appellee would have paid only $18,500 out of that $71,000 retention, on account of its catastrophe excess coverage (Tr. 123). We will, subsequently in this brief, take up the reason which this witness gave for the appellee's stating a $71,000 retention when it had provided that it might, on a $50,000 loss, reimburse itself out of excess reinsurance so that its net loss would be but $18,500, but it is necessary at this time only to state that Mr. Legris made no claim whatsoever that this statement of a net retention of $71,000 was in violation of any contract right of the appellant or of any rule of good faith or of any intent to lead the appellant (here the reinsurer) into a false assurance that the ceding company (here the appellee) would "at all times have as much at stake, dollar for dollar, in the particular insurance, as the reinsurer" (here the appellant). Nor was there any

claim asserted by Mr. Legris that making this statement of net retention of $71,000 was in any way lessening the dependence owed to the reinsurer (here the appellant) "upon the knowledge, judgment, diligence and good faith of the ceding company" (here the appellee) "in investigating and appraising the risk, placing the original insurance and making investigations and adjustments in the event of loss" (portions in quotation marks are quotations from Finding of Fact XII, Tr. 75). In other words, in this case, where it appeared that the appellee had stated a net retention of $71,000, in spite of the fact that a $50,000 loss would have been reduced by catastrophe excess insurance to an $18,500 loss, Mr. Legris did not testify that this was done with any intent to violate any of the rules of good faith or any of the rights of the appellee as the trial court, in its Findings XII, found the reinsurer was entitled to.

After these witnesses had testified, the court adjourned the trial of the case for nearly three months in order to permit the appellee to produce evidence to contradict this testimony. Upon the resumption of the trial of this case, the appellee produced the depositions of four witnesses and the oral testimony of one witness, *and not a single one of these witnesses testified that ever in his experience had he ever actually seen net retention computed by taking into account excess insurance of the type of Defendant's Exhibit 1.*

On the contrary, each one of these witnesses, applying to the present situation the words "its nett retained lines only," as used in paragraph 6 of the Lloyd's policy, Defendant's Exhibit 1 (Tr. 205), in-

terpreted those words to mean $50,000. If any organization should be taken as authority on the proper use of words in the reinsurance business, it most certainly should be the Lloyds organization. These words are here used in a printed form and the quaint language used indicates that it is not a new form. The words occur in the following sentence: "The amount of loss in excess of which liability attaches hereunder, is understood and agreed to the ultimate nett loss of the reinsured company on its nett retained lines only." In other words, in computing the amount of any loss which the Lloyds organization was to pay to the appellant, the starting figure must be the "nett retained lines only" of the reinsured appellant, and all of these witnesses stated such starting figure at $50,000.

The appellee's Assistant Secretary, who was representing the appellee at the trial of this case, was shown this Lloyd's policy for the purpose of obtaining his interpretation thereof. His attention was particularly called to this clause and he read it to the court (Tr. 146) and thereupon was asked and answered as follows:

> "Now the basis of the amount of loss then would be contained in that clause you have read, would it not? A. I would say so, yes." (Tr. 146)

Thereupon, he was asked to show how he would compute the net retention of the appellant, and he answered as follows:

> "Under the Tacoma Narrows Bridge reinsurance to the Union the Northwestern stated to the Union that its net retention was $50,000.

> That $50,000 is an amount in excess of the first loss of $30,000 provided for in this catastrophe coverage I have before me, Exhibit "1," and that being so from the $50,000 you would first deduct the first loss of $30,000, which would leave the amount of $20,000. Then from the contract the reinsurance covers 90% of that excess of $20,000, and leaves a liability to the Northwestern of 10%; 10% of $20,000 is $2,000, which added to the first loss of $30,000 shows a net retained line, as I would understand it from this contract, to be $32,000." (Tr. 147)

In other words, this witness started out with the assumption that the appellant's "net retention was $50,000," and finished with the conclusion that the appellant's net retention was $32,000!

Truly, language under which a certain quantity can shrink from $50,000 to $32,000 in the course of a short mathematical demonstration should be subject to some explanation by extrinsic testimony.

This policy, Plaintiff's Exhibit 1, was further made a part of the hypothetical question which was propounded to each one of the appellee's expert witnesses (Pryce, Tr. 243, 244; Newman, Tr. 263; Stewart, Tr. 285; Thompson, Tr. 299, 300; Towers, Tr. 314, 315).

All of these witnesses, experienced in the customs and usages of the insurance business, testified that in case of a total loss of this bridge the appellant would be entitled to recover upon this insurance agreement, Defendant's Exhibit 1, the sum of $18,000, being 90 per cent of the excess of *$50,000* over $30,000 (Legris, Tr. 111; Pryce, Tr. 246; Newman, Tr. 266; Stewart,

Tr. 288; Thompson, Tr. 302; Towers, Tr. 328), in spite of the fact that paragraph 6 of this policy, as we have hereinbefore shown, provided that the basis of the recovery of the appellant should be its "nett retained lines only." In other words, each one of these witnesses interpreted the expression "nett retained lines only," as used in the Lloyd's policy, to mean $50,000 and not $32,000, and then, by following the same process of mathematical legerdemain arrived at the conclusion that $50,000 had shrunken to $32,000.

These witnesses were all of them long on advice to the court as to how it should decide this case, but this advice was founded upon a statement by examining counsel of a hypothetical case, which (as is usual in such cases) contained only the facts which examining counsel claimed to exist in this case, and did not contain all the facts which were clearly proven in this case. Now, the question upon which these witnesses were supposed to testify was whether there was a usage or custom of the insurance business and in the insurance world whereby "the term 'net retention' or the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention" (Tr. 165). The witnesses for the appellant had specifically answered that there was such a usage and had specifically stated that never in their experience had catastrophe excess insurance been considered

in arriving at "net retention." There is no doubt but what the computing of "net retention" is an ordinary practice in the reinsurance business, and the appellant's witnesses had testified positively that never in their experience had they ever seen catastrophe excess insurance considered in arriving at "net retention," and the express purpose of the court's adjourning the trial was to enable the appellee to contradict this testimony if it could do so. But on the contrary, the testimony of the appellee's witnesses consists purely of legal opinions of persons who had no first hand knowledge of the facts of this case, but who freely expressed their individual opinions as to how the court should decide this case founded upon incomplete statements of fact made to them by examining counsel. The net result remains that after nearly three months of what must have been a diligent search over the entire country, the appellee was absolutely unable to produce testimony of a single instance where catastrophe excess reinsurance had been taken into account in computing "net retention."

3. THE REASONS GIVEN BY THE APPELLEE'S WITNESSES FOR THEIR NEVER HAVING SEEN AN INSTANCE OF EXCESS INSURANCE BEING TAKEN INTO ACCOUNT IN COMPUTING NET RETENTION.

The witnesses for the appellee stated two circumstances under which catastrophe excess reinsurance is admittedly not taken into account in computing "net retention."

First: Where the amount of the attachment point

(here $30,000) exceeds the net retention on a single risk.

Second: Where the existence of the excess reinsurance is known or made known to the pro rata contributing reinsurer.

Some of the witnesses stated one of these sets of circumstances, some the other, but no witness stated that both sets of circumstance had to be concurrent. We will take up each set and show that such circumstances existed in this case.

First: Where the amount of the attachment point of the excess reinsurance (here $30,000) exceeds the net retention of the reinsured company on a single risk. The witness, J. M. Legris, Assistant Secretary of the appellee, was shown Plaintiff's Exhibit 2 for identification (Tr. 116). This exhibit, after having been admitted in evidence, is set out at Tr. 125-128. According to this witness, it shows a retention by the appellee of $71,000 wind insurance (Tr. 117, 122). On being asked (Tr. 123):

> "Q. * * * Suppose a loss had been sufficiently large to take up $50,000 of your $71,000 retention, how much would you have had to pay? A. $18,500. Q. Why would you have had to pay only $18,500, instead of the full $50,000? A. Because the loss would have involved so many of these individual units under this insurance that the catastrophe coverage in the aggregate on the individual units would have come into play. Q. And would have reimbursed you for all of that in excess of $18,500? A. Yes, sir. Q. Where in that daily report to the Northwestern did you disclose that under those circumstances your net

retention would have been only $18,500 instead of $71,000? A. Nowhere. Q. Why did you not do it? A. Because this particular type of coverage is a coverage which is not an individual unit coverage; but is a coverage on a multitude of risks. Q. The real reason is you could not tell until after a loss whether your excess contract would ever come into play or not, is that not true? A. That is true. Q. It would be physically impossible for you to report any other net retention than $71,000? A. That is true. Q. Because you could not determine it until the loss occurred? A. That is right. Q. And your distinction, as I get your testimony, between your situation where you did not report and the Northwestern's ceding to you this bridge insurance, is that you assumed there was one risk instead of more? A. That is right." (Tr. 123, 124)

Appellee's witness, John D. Pryce, stated: "A. I would say that if the Northwestern's net retention on a risk is more than $30,000 it is obvious that this excess policy could be involved in a loss on one risk alone" (Tr. 259). Note that the condition is that *a* risk should be more than $30,000.

Also, the appellee's witness, Walter J. Thompson, being asked: "What is the meaning in the insurance business of the term retained net without reinsurance by the reinsured company at its own cost and liability," stated:

"A. It would mean that the reinsurer under this treaty would not have a liability for loss greater than the ceding company is willing to bear on the same risk after taking into consideration all reinsurance including excess of loss re-

insurance *which would apply on one risk.* Now, I just like to qualify that by saying that if the ceding company's loss on any one risk or any particular risk were reduced by the pro rata application over several risks or any number of risks on a recovery made by them under a catastrophe cover, such reduction would not constitute a violation of their retention. It would be assumed that the excess point in any catastrophe—in any such catastrophe cover would be as great as or greater than the retention of the company on that particular risk or on any one risk." (Tr. 300, 301) (Italics ours).

Also, in the testimony of John Alden Towers, expert witness produced by the appellee, we find the following (beginning at foot of Tr. 343):

"Q. * * * My question was this. That where the amount retained is less than the attaching point of the catastrophe policy on a single risk, then that catastrophe policy need not be considered in reporting that retention? A. That is correct. If the retention—net loss retention—catastrophe cover under an excess of loss cover exceeds the amount retained net by the company ceding, I would say it would be customary for the accepting company to waive the coverage—to ignore it. Q. (By Mr. Cook): Mr. Towers, getting back to this same thought we had before recess, do I understand that if the retention as reported by the Northwestern to the Union had been less than $30,000 on a single risk, then there would be no complaint on the part of the Union? A. It would be customary that there would be no complaint. I cannot say what the Union might have done. Q. If the retention of the Northwestern on a single risk was less than $30,000.00 would the method

employed here be in accordance with the practice of the insurance world? A. My answer is yes. Q. And there would be in your judgment no need for them to have said anything about the existence of Plaintiff's Exhibit No. 1? A. It would normally have been done, but not on a cession. It would normally have been done at the time the treaty was in force, and normally the treaty would have said, 'Catastrophe reinsurance ignored for the purpose of this contract,' or words to that effect. Q. But it could have no effect if their retention on a single risk was less than $30,000? A. It would not be customary to object to the claim—that is really what you are after." (Tr. 343-345)

In the above quotations we have the positive statements of the appellee's most important expert witness and the admission of the appellee's officer, Mr. Legris, that if the amount of the net retention of the appellant *on one risk* was less than $30,000, the amount stated in Defendant's Exhibit 1 as the attaching point of the coverage there provided for, there would be absolutely no necessity for paying any attention to the existence of this Defendant's Exhibit 1 in computing the net retention of the appellant.

The above statement contains but one term which requires explaining, and that is, "What is 'one risk' as there used?" This term was defined for purpose of this trial in the following incident (Tr. 131): During the cross-examination of the appellee's witness, J. M. Legris, the attention of the witness was directed to Sheet 3 of Plaintiff's Exhibit 3, which is copied at Tr. 218. Thereupon the following occurred:

"Q. Is there anything on that sheet to indicate

there is more than one risk involved, except the estimated PML. A. Nothing. The Court: You mean risk on property other than that covered by the known and expressly accepted risk? Mr. Cook: No. A risk, as we use the word, is any one part of a property which is subject, in the judgment of the underwriter, to one loss. Q. Is that not a fair statement of that, Mr. Legris? A. That is fair enough, yes, sir. Q. In other words, one unit may be considered, in the judgment of the underwriter, as two risks, is that true?

A. Yes, sir." (Tr. 131)

The various witnesses gave various examples of what was "one risk," and what was more than "one risk," as, for instance, the witness Towers mentioned a 44-story modern fire-resisting building and stated: "Some underwriters would say each one of those floors might be a risk. Others might say three or more floors would be a risk" (Tr. 330). This witness, when asked to explain, "What is a single risk in the insurance world," answered: "Well, I spent three weeks trying to word a definition of single risk which would be approved by certain underwriters on a contract before I got an answer which was approved, and later found that there were flaws in that definition, and so I am afraid that I cannot answer that question" (Tr. 345). This witness further testified:

"Q. It is of course customary in all kinds of insurance, is it not, for an underwriter to determine the number of risks on a particular property? A. An underwriter reviews the diagram of the risk of such inspection reports as he might have or descriptions of the risk, and deter-

> mines to his own satisfaction whether he considers it more than one risk, yes, for the purposes of the perils covered. Q. That is the customary and accepted method of underwriting property, is it not? A. Yes, sir. And this opinion varies with different underwriters." (Tr. 346, 347)

It therefore appearing that the term "one risk" carries in the insurance world no definite formula for its calculations, the reinsurance agreement between the parties to this law suit provided in Article VIII that "*the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company*" (Tr. 32). It must be taken, also, as a conceded fact that there is no rule that one structure cannot involve more than "one risk."

There can be no question but what the appellant had the right and duty to determine and had determined that "one risk" involved in writing the insurance on this bridge did not exceed 50% of the insurance written.

The appellant's Executive Vice-President, John J. Beall, testified as follows:

> "Q. But at the time the policy was issued and this insurance ceded to the Union it was your judgment, the judgment of the company in underwriting, that the possible maximum loss from any one event would not exceed 50% of the value? A. That is right. Q. Is that correct? A. That is correct. Q. Are you prepared to say you used your good judgment in making such an appraisal on that risk? A. Yes, sir. Q. And you acted in good faith in so doing? A. That is true." (Tr. 222, 223)

Felix F. Kurz, Vice-President of the General Insurance Company of America, which placed $1,000,000 gross of insurance on this same bridge (Tr. 383), testified as follows:

> "A. Actually when we have a component unit of the same structure, as for example this bridge, or a fireproof building, we do not divide it down quite as finely as we would if each of those units was distinctly and definitely separated. In this case the bridge had several piers, it had approaches, it was supported by cables, and at the time we underwrote that bridge we thought at the very most 50% would represent the maximum loss. Q. Wasn't it your opinion that no matter what hazard or catastrophe occurred that the bridge would not be totally destroyed, but the worst that would happen to it would be 50% destroyed? A. Yes, sir. Q. Wasn't that really an estimate of the probability of the amount of loss in the event of any storm hazard? A. Yes." (Tr. 384)

Mr. H. D. Heath, an assistant secretary of the appellant, in his letter addressed to the appellee (Tr. 97, 98) gave a breakdown of the various parts of this bridge, and states:

> "On our reinsurance certificate we indicated probable maximum liability of 50%, but we never for a moment entertained a thought that there would ever be damage equal to 50% of the total value, let alone nearly 80%."

In paragraph 8 of the Amended Complaint appears a letter written by counsel for the appellant to the appellee, which contains the following:

> "We have read the correspondence which has

> passed between you and Mr. J. J. Beall, Executive Vice-President of the Association, and we fully agree upon his stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than $25,000 on a single risk. I therefore see no necessity of repeating his argument upon this point." (Tr. 44)

To this letter the appellee replied by the letter set out on page 46 of the Transcript, wherein we find the following:

> "With reference to your letter of December 29, regarding the Northwestern Mutual Fire Association's claim in connection with the above loss, we have not at any time questioned the points which you mention." (Tr. 46).

The passing between the parties of these two letters is expressly admitted in the defendant's amended answer (Tr. 60) and there is no attempt in the pleading to minimize the effect thereof.

It thus appears that the appellee admitted that it had no contention to make as against the claim of the appellant that it, the appellant, had adjudged that "one risk" in this case was 50% which, applied to the net retention of the appellant, amounted to $25,000, and that such judgment was final. This case was finally submitted to the court over a year after the passing of these letters, during which time the appellee most certainly had ample opportunity to obtain (if obtainable) any testimony to the effect that the appellant was guilty of any fraud or over-reaching in thus evaluating "one risk," and there is noth-

ing in this case to indicate that this judgment was in any wise negligent or fraudulent.

Therefore, it is most certainly and absolutely a proven fact in this case that "one risk," as used in the contract and as used by the witnesses Legris and Towers in the quotations above set forth, was $25,000, and this sum is less than the $30,000 which was fixed by Defendant's Exhibit 1 as the attaching point where the excess insurance was to start.

In this connection we might mention that counsel for the appellee made considerable ado in the trial court over their claim that the judgment of the appellant that "one risk" was 50% was never communicated to the appellee. A perfect answer to this claim is that it was communicated. The telegram offering this cession, Defendant's Exhibit A-1 (Tr. 92), stated: "Further information just received indicates PML about 50%." Defendant's Exhibit A-5, the definite report of this cession of reinsurance (Tr. 94), states: "P.M.L. 50%," and Mr. Legris, the officer of the appellee, whose duty it was to interpret these terms for and on behalf of the appellee, stated:

> "Q. May I ask you if it is not a fact that there is no—it is understood that there is no risk involved greater than the estimated PML? A. In those sheets? Q. In those sheets or in your other dealings with the company? A. I believe that is so, yes." (Tr. 134)

Thereupon, he attempted to explain this answer, but he closed this explanation with the following statement:

> "A. The PML determines the amount of the

> retention by the ceding company on any one risk, because the PML, by itself—by its express percentage—says the quality of the risk is a certain quality, and what in the judgment of the underwriter of the ceding company it is expected a loss may be under that particular risk." (Tr. 135)

If we now take the formula contained in the last above quoted answer and apply thereto the quantities which were known by reason of having been expressly stated in Defendant's Exhibits A-1 and A-5, to-wit: PML 50%, and retention by the ceding company $50,000, we will have "the PML (50%) determines the amount of the retention by the ceding company ($50,000) on any one risk," which by a simple process of mathematics results in $25,000 as the amount specifically stated in these two exhibits to have been what in the judgment of the underwriter of the ceding company was "one risk." Now, $25,000 is a less sum than $30,000, which was the attaching point named in the catastrophe excess policy, Defendant's Exhibit 1.

In the portion of the testimony of Mr. Legris which we have already quoted from Tr. 123 and 124, he stated that the difference between the case of the cession of reinsurance from the appellee to the appellant set forth in plaintiff's Exhibit 2 and the appellant's ceding to the appellee reinsurance on this bridge, was that he "assumed there was one risk instead of more." As we have shown, this assumption was purely a matter of the witnesses's imagination, arising probably out of the fact that the subject matter of the

insurance was a bridge; but whatever was the basis of his assumption, it could not have been obtained from Defendant's Exhibit A-1 or Defendant's Exhibit A-5, because as we have shown, these exhibits expressly notified the appellee that in the judgment of the appellant there was no one risk involved greater than 50% of the amount retained net by the appellant or 50% of the amount ceded to the appellee.

Counsel for the appellee meticuously asked its expert witnesses questions of which the following is typical:

> "Q. To what extent, if any, is the term 'P.M.L.' used to indicate the number of risks involved by reinsured companies, in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?" (Tr. 247, 267, 288, 302, and 330)

The answer to this question must necessarily and obviously be "none" for the reason that the only information on this point that is material is the size of the maximum "one risk" which is involved in the transaction; and when that information is given, it is absolutely immaterial into how many individual risks the balance of the transaction could be divided. *It will be noticed that the reinsurance agreement set out in this case makes absolutely no mention of the number of risks involved in a transaction, the only mention being the limitation contained in Article VIII of the size of "one risk" and the further provision that "the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company."*

As stated by Mr. Beall (which is merely a truism) "you might have two risks entirely separate, the 66⅔ of your valuation in one and 33⅓ in the other (Tr. 232)."

We might take, for example, the last item set out in Defendant's Exhibit A17, Tr. 364, wherein the PML is set at 60%, while the subject matter of the insurance is 22 items of property located in 16 towns. This would mean that it was the judgment of the reinsured company that there was "one risk" involved in this transaction which amounted to 60% of the insurance. This might be but one of the 22 descriptions, or might be half a dozen of those 22 descriptions, if there were that many so close together as to constitute one risk. It is easy to see that the reinsurer is in no way interested whatever in the number of the lesser risks involved in the transactions. What the reinsured is interested in in this matter (and the only thing) is the size of the greatest one of the risks involved; and as we have heretofore shown, *it was Mr. Legris' understanding that this risk was not greater than the expressed PML.*

Or we might take the cession made by the appellee to the appellant, shown as Plaintiff's Exhibit 2 on page 125, and which is explained by Mr. Legris on pages 120 to 123. From this explanation, it appears that the aggregate insurance placed by the appellee on this property was $4,260,000. The PML was expressed at 3%, or $127,800, which was the amount of the fire retention. It appears on page 126 that this policy covered extremely numerous structures and items of personalty. There was no attempt made to

tell just how numerous these different items of insurance were, but the statement that the PML was 3%, which told the reinsuring company the limit of the maximum risk, was all that was required.

So, in the cession of this bridge, the breakdown of the costs of the various items constituting this bridge appears in Defendant's Exhibit A-8 (Tr. 98). Taking only unit 6 there, we readily see that "approach, grading, and paving, administrative building and toll booths, toll house equipment and lighting system" must necessarily have constituted numerous separate risks; but there was no attempt to count these separate risks. What the appellant had done in this case was compute the value of all of the property which might be involved in one single loss, and state that in terms of percentage of the whole. This they did and stated to the appellee that this sum, or the PML, was 50%. From this, Mr. Legris, according to his own testimony, understood that it was the judgment of the appellant that the greatest single risk involved in this insurance was 50% of such insurance. Inasmuch as there could be not the slightest doubt that the answer to this question so tediously propounded by counsel for appellee must necessarily be "none," it is evident that this question was asked in an attempt to impeach the appellant's witness Beall because he adopted the insurance man's vernacular in referring to a 50% PML as a "two-risk" transaction. All that he meant, or could have meant, was, as he hastened to explain at the beginning of his cross-examination, "50% would indicate two and 25% would indicate four."

4. THE APPELLEE HAD KNOWLEDGE OR NOTICE OF THE EXISTENCE OF THE CATASTROPHE EXCESS INSURANCE CARRIED BY THE APPELLANT.

The expert witnesses produced by the appellee appear to be unanimous that one of the reasons for not taking excess insurance into account in computing net retention is that it is customary for the reinsurer to inform the reinsured of the existence of such excess insurance.

Some of these witnesses thought that it would be better that this information was set out in the reinsurance treaty, but appellee's witness Edwin Stewart testified as follows:

> "Q. But from a practical standpoint, and so far as any effect it might have on the Union's accepting that amount, if they knew of the existence of that Lloyd's policy, Exhibit 1, that was all they were entitled to know? A. No. I think it might have influenced their acceptance. * * * Q. If they knew of the existence of Exhibit 1 and still accepted the amount ceded, the form of reporting of course was very unimportant? A. If they knew it and still accepted the $50,000, yes." (Tr. 294, 295)

The witness Walter J. Thompson testified as follows:

> "In other words, if they actually knew of the existence of this policy they would not be justified in assuming anything? A. That is right." (Tr. 306)

The witness John Alden Towers testified:

> "Q. Is it normal for a company ceding reinsurance and stating its net retention to its reinsurer, to advise its reinsurer of the existence of

> excess of loss reinsurance which might affect its loss thereafter? A. It is as respects excess of loss, but not as respects catastrophe. Out of an abundance of precaution we advise our clients—Mr. Cook: That is not material what he advises his clients. I don't like to object, but— The Court: The objection is sustained. Q. You say it is customary with respect to excess of loss? A. Yes, sir. Q. How is that done? A. It is done in the printed blanks on specific reinsurance, or in cables or letter correspondence. I am not speaking of treaties now. Companies usually have printed forms, either prepared by the brokers or prepared by their own people, upon which this information is disclosed. As regards treaties it is usually done by specific mention in the treaty, or by exchange of letters." (Tr. 318)

Counsel for the appellee must have been mindful of the rule that information regarding the existence of this catastrophe excess reinsurance would have been equivalent to mentioning it specially in these documents when he asked Mr. Legris on his original direct examination: "Prior to the receipt of that letter of October 1, 1941, by your company, had your company been advised in any way by the Northwestern of this excess catastrophe reinsurance of which it speaks? A. No, sir" (Tr. 105). The force of this answer of Mr. Legris, however, was wiped out by the admission of the same witness upon cross-examination, when he stated as follows:

> "Q. Do you mean to tell the court that none of the officers of your company knew the Northwestern carried this excess policy, Plaintiff's Exhibit '1' for identification? A. For myself I would

say I didn't know. Q. You didn't know. A. And I could not tell for the others." (Tr. 138)

It may be that the answer of Mr. Legris, as to whether his company had been "advised in any way" by the appellant as to the existence of this excess catastrophe reinsurance, was truthful if the effect of that question be limited to himself, and if thus limited, his answer could be accepted as true; but he was only one officer of that company and there can be no question but what other officers of the appellee and particularly the officer who negotiated the first reinsurance connection between the parties (Mr. Easton), knew all about this catastrophe insurance as shown by the following evidence.

Mr. Beall, the Executive Vice-President of the appellant, testified as follows:

"Q. Who negotiated the reinsurance contract with the Union under which this reinsurance was ceded to them? A. I did, personally. Q. When? A. I believe the year was 1928. The place was Milwaukee, Wisconsin, and I was talking with Mr. Easton, the former vice-president. Q. Do you recall his initials? A. No, I do not. Q. Is he now connected with that company? A. I think he has retired. Mr. Dumett: Eastman? A. Easton. Q. (Mr. Cook): And is that the same general contract under which this particular business was ceded to the Union? A. If it is not the identical contract there has been no modification in its terms." (Tr. 225)

* * * "A. We had a complete discussion of our underwriting program and of the reinsurance each company carried. Q. As a part of the discussion was the matter of catastrophe contracts

of insurance discussed? A. Yes, sir. Q. Was he advised at that time of the Northwestern's policy of carrying such contracts? A. He was." (Tr. 227, 228)

It must be remembered that this testimony was given in December, 1942, and the trial of the case was subsequently adjourned to April 20, 1943 (Tr. 240). During this time, the appellee had ample opportunity to interview Mr. Easton and to obtain his testimony either by deposition or personal attendance in court if there had been any question as to the truth of Mr. Beall's statement. The fact that they did not take this opportunity would indicate that they were satisfied that the statement of Mr. Beall was true and it, therefore, must be taken as one of the established facts of this case that at the beginning of the reinsurance relationship between these two parties, each party was fully informed as to the details of the excess insurance carried by the other party.

Further more, Mr. Legris, on being asked how he knew that the appellant "was a much stronger company than" the appellee, stated that he received that information from known financial reports, and then stated: "I see a book on the table there, Best's Fire Insurance Report" (Tr. 136). He had known it "a good many years * * * I would say over 20" and had occasion to refer to it from time to time in his business. It had been in the office of the appellee for years and had been referred to by the witness and other officers of his company many times (Tr. 137), but he wouldn't know as to whether any officer of his com-

pany ever looked at or referred to the report of the Northwestern contained in this volume (Tr. 137). Thereupon at the request of appellant's counsel, this witness read to the court from the report contained in that volume regarding appellant:

> "A. 'The Association has very satisfactory arrangements under reinsurance treaties for reinsuring excess lines, besides it carries a first excess catastrophe coverage for $200,000, applicable to all hazards in excess of $30,000, and the second excess over $250,000, up to $500,000, with a group of American reinsurers and London Lloyds." (Tr. 138)

This witness, after having further testified that he personally had not looked up the statement of the Northwestern on account of the confidence which he had in the Northwestern, testified as follows:

> "Q. Is the reason for that because you are not interested in what catastrophe coverage they carry? A. The answer possibly is this, that we do know from our own experience that catastrophe coverages have their value, and we have confidence when we find the financial stability of a company is of the type we want, that that company is financially strong, because it has safeguarded itself with the usual safeguards of catastrophe coverage. Q. In other words, even without investigation you know that these strong companies do carry covers of that kind? A. Right. Q. Do you not? A. Yes. Q. And you knew the Northwestern carried one? A. *I would say the Northwestern being a financially strong company, in which we have confidence, would normally, like we were doing, carry catastrophe insurance.* Q. And you know they have carried

it for the thirteen or fourteen years you have been doing business with them? A. *I would assume we knew it, because it is a common practice.*" (Tr. 157). (Italics ours).

Furthermore, the appellant's witness John F. Sullivan, for nine years connected with the Insurance Department of the State of Washington, testified that companies domestic in the State of Washington are examined annually by the Washington Department and every three years by examiners from outside states who are invited to participate with the Washington examiners, and that these examinations summarize the terms of catastrophe policies carried by the domestic companies, giving the limits, and that a copy of the report of these examiners is filed with the insurance department of every state in which the company is entitled to do business (Tr. 190, 191). Upon cross-examination, this witness stated that these reports showed the actual amounts of the reinsurance. For the purpose of impeaching this testimony, the appellee offered Defendant's Exhibit A-14, made for the period ending December 31, 1938, by examiners from four states, and Defendant's Exhibits A-15 and A-16, reports made by examiners for the State of Washington for the periods ending December, 1939, and December, 1940. These exhibits specifically mention the excess reinsurance carried by the appellant, Defendant's Exhibit 1, but these particular exhibits do not state the amounts (Tr. 397-400). Therefore, all that they prove toward the impeachment of Mr. Sullivan is that counsel for the appellant, after searching through the department records, was able to find

three reports which did not specifically state the amounts of the excess reinsurance.

To sum up upon this point, the facts are well established in this case that the appellee was specifically informed of this excess insurance at the time of the commencement of the business relations between the parties, that it had in its office at the time of accepting this cession of reinsurance full information regarding the appellant's excess reinsurance in a standard volume of reference; that the only reason why the particular officer of the appellee who testified in this case did not refer to this book to obtain this information was that he was satisfied at the time that the appellant did have this reinsurance and that the information was further available in the official records of the insurance department of his home state.

Therefore, to have specifically mentioned this excess reinsurance during these negotiations would have been futile.

5. THE REAL REASON FOR NOT TAKING INTO ACCOUNT EXCESS INSURANCE IN COMPUTING NET RETENTION.

Inasmuch as the existence of a usage is purely and simply a question of fact to be determined as a question of fact by testimony of witnesses who are supposed to know such fact, the reason for such usage does not enter into the question of whether the court should recognize such usage. It might, however, have a bearing on the court's conclusion as to whether such a usage really exists and, therefore, we would submit that the testimony shows that this usage to

disregard excess reinsurance in computing net retention had its origin in necessity. If we take the present case as a proper example, the appellant's policy of catastrophe excess insurance, Plaintiff's Exhibit 1, insured the appellant against loss in its entire business from any one cause "limited to $200,000 each and every loss being 90% of the excess of $30,000 loss each and every loss" (Tr. 200). This means that in case the appellee suffered an aggregate of losses from any one cause of $200,000, the Lloyds insurers would reimburse the appellee therefor to the extent of 90% of the excess of such loss ($200,000) over $30,000, or $153,000, so that, in the event the appellee suffered a loss of $200,000, its actual loss after collecting on this policy would be $47,000, or 23½% of its loss. This percentage, applied to the $50,000 stated by the appellant as its net retention upon this transaction, would mean that in such an event its loss on this bridge would have been but $11,750.

On the other hand, if the appellant had suffered several losses, each one of which was less than $30,000 upon its stated net retention, but amounted in the aggregate to $50,000, it would have paid that entire $50,000, or 100%, and in the event of any one loss less than $30,000, the appellant would, of course, pay 100% of that loss. The net result of this is that the total net loss that the appellant *might* sustain on account of a total loss of this bridge and after exhausting both its specific, contributing reinsurance and its catastrophe excess reinsurance, might vary anywhere from $11,750 to $50,000, dependent upon circumstances.

Appellee's counsel, in asking its expert witnesses to compute "the highest possible loss which Northwestern could sustain," was very careful to limit the question by including therein the phrase "in the event of any one loss" (Tr. 246, 266, 288, 302, 328), and this phrase was repeated in the court's Finding of Fact XIII (Tr. 75). Now, if the term "net retention" is so "plain, clear and unambiguous as not to permit modification, amendment or interpretation by extrinsic evidence" (Tr. 78) why is it necessary continually to interpolate this phrase without giving any reason therefor?

Furthermore, if "excess of loss reinsurance such as Plaintiff's Exhibit 1" (Finding XVI, Tr. 79) must be deducted in order to arrive at "net retention," what sum is to be deducted? Is it (1) $153,000, the maximum amount of the excess insurance, or is it (2) $38,250, the amount which the appellant would realize on a total loss of this bridge coupled in the same catastrophe with other losses aggregating $200,000, or is it (3) $18,000, the amount which the appellant would realize on a total loss of this bridge unconnected with any other loss, or is it (4) $9,133.85, the amount recoverable by appellant in this case upon its excess reinsurance, or is it (5) nil, the amount which the appellant would realize in the event of a loss within the limits of the greatest loss which, in the judgment of the appellant (which the contract declared to be binding on the appellee) could be sustained, or is it just plain (6) nil, because that is the only amount at which it *can* be placed and permit any recovery at all under paragraph 6 of appellant's excess

reinsurance contract? Here are six tendered interpretations of the meaning of the court's expression (as used in its Finding XVI, Tr. 79) "excess of loss reinsurance such as Plaintiff's Exhibit 1" and we await with interest the explanation of counsel for appellee why the first, second, fourth, fifth and sixth interpretations are so flimsy that the court is justified in ruling that the language in question is so unambiguous as to permit of no interpretative definition.

We respectfully submit that the only refuge of persons in the reinsurance business in this plethora of interpretations was to refuse absolutely to consider catastrophe excess reinsurance in computing "net reinsurance" wherever and however that term should be used; that their usage so to do was conclusively proven; that there was no testimony that such a usage had ever been disregarded; and that, therefore, it should be followed in this case, which would mean that the appellant's "net retention" should be adjudged to be as stated in its cession to the appellee, *i. e.*, $50,000, and recovery had by the appellant for the amount due as computed on that basis.

Respectfully submitted,

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